



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, KIAGE & M'INOTI, J.J.A)**

**CRIMINAL APPEAL NO. 19 OF 2003**

**BETWEEN**

**RICHARD MUTHAMA NYAGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Machakos (Makhandia & Ngugi, JJ.) dated 15<sup>th</sup> June, 2012*

**in**

**H.C.CR.A No. 108 of 2007)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. **Richard Muthama Nyaga**, the appellant, was jointly charged with Justus Makau Kisunu (Justus) and Joseph Masila Kimilu (Joseph) with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in the Chief Magistrate's Court at Machakos.

The particulars of the charge were that on 31<sup>st</sup> August, 2004 at Ngangani Village, Yathui Location in Machakos District within the then Eastern Province, the appellant and his co-accused jointly with others not before the court, being armed with dangerous weapons namely bows, arrows and pangas robbed Fredrick Maundu Mutua of cash Kshs. 30,800/=, Sony Erickson mobile phone, one Artech radio, two pairs of black shoes, two pairsof jeans trousers, one radio speaker, three head caps, one godfather hat allvalued at Kshs. 52,500/= and at or immediately before or immediately after such robbery threatened to use violence on the said Fredrick Maundu Mutua.

The appellant and his co-accused pleaded not guilty to the charge. The prosecution called a total of four witnesses in support of its case. It was the prosecution's evidence that on 31<sup>st</sup> August, 2004 at around 3:00 a.m PW1, Fredrick Maundu Mutua (Fredrick), woke up and saw light from torches through his window which was open. He testified that the light from the torches was directed to him. Fredrick noticed arrows at the window; the arrows were pointed at him. He was ordered to open the door. Fredrick gave

evidence that he heard someone say, 'Maundu fungua mlango au tukuue' (Maundu open the door or we kill you). Fearing for his life, Fredrick opened the door and with the aid of the moonlight he saw six robbers. One of the robbers was big and was armed with a panga; three of the robbers were armed with arrows.

The robber who was armed with a panga, ordered Fredrick into the room and directed him to lie on the bed. The other robbers were left outside the room. The robber who was inside the room opened the side drawers and took Kshs. 20,000/=; he also directed Fredrick to stand up and he took a further a sum of Kshs. 10,000/= which was under the mattress. The said robber also searched Fredrick and took Kshs. 800/= from his pocket. Thereafter, two robbers came in and took Fredrick's mobile phone, 4 pairs of trousers, 3, 2 shirts, two jackets, three caps, one godfather cap which was brown in colour and a wrist watch. Subsequently, another robber who Fredrick recognized as the appellant entered the room and took the radio and left. It was Fredrick's evidence that during the robbery he was able to recognize three of the assailants as the appellant and his co-accused; he knew them prior to the incident as they used to work for his father. The robbers locked Fredrick in the room and left.

When Fredrick was certain that the robbers had left, he called PW2, Harrison Munyao Kambulu (Harrison), who was in another room in the same compound to open the door for him. Harrison had been employed as a farm hand by Fredrick's father. After the door was unlocked, Fredrick requested Harrison to accompany him to his father's shop where Justus and Joseph, the appellant's co-accused, were sleeping. Upon arriving at the shop at around 4:00 a.m., Fredrick and Harrison noticed that the door was open and the hurricane lamp was on. They found the appellant's co-accused chatting. Fredrick asked them why the door was open; the appellant's co-accused informed him they wanted to collect firewood to make tea. Fredrick also inquired if the appellant had been there. Both Fredrick and Harrison testified that Justus informed them that the appellant had not been at the shop while Joseph informed them that the appellant had been at the shop and had just left.

After informing his father about the incident, Fredrick requested Joseph to accompany him to the District Officer's office. Fredrick reported the incident to PW3, APC Leonard Kimanthi (APC Leonard). APC Leonard testified that Fredrick informed him that he had recognized some of the assailants and gave their names. Fredrick also informed him that Joseph who had accompanied him was one of the assailants. APC Leonard arrested Joseph, and together with him other police officers, headed to the scene; on their way they saw the appellant who was wearing a brown godfather hat; Fredrick recognized the hat as the one which had been stolen. The appellant was arrested. Fredrick led the police officers to where Justus was and he was also arrested. The appellant and his co-accused were taken to the District Officer's office.

Meanwhile, on the same day at around 8:00 a.m. PW4, PC Wilson Lemetei (PC Wilson), who was stationed at Wamuyu Police Patrol base, received a call from one Simon Balonzi, the Chairman of Wamuyu Market, informing him of the incident. He went to the scene and carried out investigations. Later the appellant and his co-accused were handed over to him and he re-arrested them. The appellant and his co-accused were arraigned and charged in court.

After the close of the prosecution's case, the trial court acquitted the appellant's co-accused on the ground that they had no case to answer

However, the trial court found that a case had been made against the appellant and placed him on his defence. In his defence, the appellant gave a sworn statement. He testified that he used to work for Fredrick's father, Joseph Mutua Kaindi. On 22<sup>nd</sup> August, 2004 Fredrick falsely told his father that he was not doing his work well. As a result Fredrick's father fired him. The appellant demanded for his salary but Fredrick's father told him he did not have money and to wait until the end of the month, when he would be paid.

On 30<sup>th</sup> August, 2004 the appellant went to Fredrick to collect his salary; Fredrick refused to pay him. It was the appellant's evidence that he was stranded because he had no bus fare to go back home. He had no choice but to approach Joseph who used to work for Fredrick's father to give him a place to sleep. On the said night he slept in the same room with Joseph which belonged to Fredrick's father. The following

morning he woke up very early and left around 7:00 a.m. to look for a casual job so as to raise money for his fare back home. While on his way a vehicle stopped beside him and a man alighted; the said man instructed him to enter the said vehicle. He was later taken to the AP camp where he was beaten by the police. Later on Joseph was also arrested and they were both beaten by the police. After seven days in custody they were arraigned and charged incourt. The appellant denied committing the offence he was charged with.

The trial court convicted the appellant and sentenced him to death. Aggrieved with the said decision, the appellant filed an appeal in the High Court which was dismissed vide a judgment dated 15<sup>th</sup> June, 2012. It is that decision of the High Court that has provoked this second appeal based on the following grounds:-

- ***The first appellate court erred in law in confirming the conviction and sentence against the appellant yet his constitutional and fundamental rights to be afforded a fair trial, imperative in an adversarial court system, were grossly violated.***
- ***The trial was flawed in law from the very onset as the particulars of the charge and every ingredient thereof were not read and explained to the appellant.***
- ***The first appellate court erred in law in confirming the conviction and sentence against the appellant yet the prosecution had not proved its case beyond reasonable doubt.***
- ***The first appellate court erred in law by failing to find that the evidence adduced pointed to a case of handling stolen property and not robbery with violence.***
- ***The first appellate court erred in law by failing to reconsider and evaluate the evidence on record.***
- ***The first appellate court erred in law in accepting the doctrine of recent possession without considering the appellant's side of evidence regarding the hat in question.***
- ***The first appellate court erred in law by failing to recognize that the circumstances under which the identification of the appellant was made were not reliable.***
- ***The first appellate court erred in law in relying on contradictory evidence adduced by the prosecution witnesses.***
- ***The first appellate court erred in law in confirming the conviction and sentence against the appellant which was harsh and excessive in the circumstances.***

Mr. Ochengo, learned counsel for the appellant, submitted that the appellant's constitutional right to a fair hearing was breached. This was because the language which was used at the trial court was never indicated. He argued that the trial court failed to explain the charge to the appellant in a language he understood. According to Mr. Ochengo, both lower courts failed to properly analyze the evidence on recent possession. He submitted that the evidence was full of contradictions and the appellant was never found in possession of any of the stolen items. He also faulted the evidence on identification of the appellant. He argued that the identification was not proper. According to Mr. Ochengo, at the best the case was one of handling stolen property and not robbery with violence. He urged us to allow the appeal.

Mr. Omondi, Senior Assistant Deputy Public Prosecutor, in opposing the appeal, submitted that this was a second appeal and only matters of law could be considered. He submitted that there were concurrent findings of fact on the issue of identification; there was moonlight and light from the torches which enabled Fredrick to recognize the appellant. According to Mr. Omondi, the appellant entered a plea of not guilty hence he understood the charge against him. He argued that the doctrine of recent possession had been properly invoked as the appellant was found in possession of the complainant's hat and he failed to offer a reasonable explanation for the same.

This is a second appeal and this Court by dint of **Section 361** of the **Criminal Procedure Code** is restricted to delve on matters of law only. In **Kaingo –vs- Republic (1982) KLR 213**, this Court at page 219 stated:-

**“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari C/O Karanja –vs- R (1956) 17 EACA 146)”**

Based on the foregoing, we are of the considered view that the following issues arise for our determination:-

- **Was the appellant’s constitutional right to a fair hearing infringed?; if so what is the consequence?**
- **Were the particulars of the charge against the appellant explained to him?**
- **Was recognition evidence safe to warrant the appellant’s conviction?**
- **Did the two lower courts err in invoking the doctrine of recent possession in this case?**
- **Was the sentence meted out to the appellant harsh and/or excessive?**

15. **Section 77(2)(b)** of the former **Constitution** which was in force at the time of the appellant’s trial provided:-

**“(2) Every person who is charged with a criminal offence-**

**(a).....**

**(b) shall be informed as soon as reasonable practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged with; ....”**

The appellant pleaded not guilty to the charge of robbery with violence. We note that the appellant was represented by counsel throughout the trial. No objection was raised in respect of the manner in which the plea was taken. There is no evidence that the appellant was unaware of the charge against him. We also note that the issue of infringement of the appellant’s right to a fair trial was never raised in the two lower courts. Having perused the record we find that the appellant’s contention lacks merit.

It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In the case of **R –vs- Turnbull and others (1976) 3 All ER 549**, an English case, Lord Widgery C.J. had this to say:-

**“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?”**

.....

***Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.***

Having perused the record, we note that both lower courts correctly cautioned themselves on the danger of relying on the evidence of a single identifying witness in convicting the appellant. Both courts concluded that the evidence of recognition was sufficient to sustain the appellant's conviction. It was the complainant's (Fredrick) evidence that he recognized the appellant during the robbery; he had known the appellant prior to the incident; the appellant had worked for his father for a period of 3 years. In

***Abdallah Bin Wendo -vs- R 20 E.A.C.A 166*** at page 168 the Court said:

***“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”***

In the instant case, Fredrick testified that he was able to recognize the appellant with the aid of the moonlight which was bright at the material time. He also testified that when the appellant entered the room to pick the radio he was also able to recognize him with the help of the light from the torches the assailants had. In ***Maitanyi -vs- Republic (1986) KLR 198***, this Court at page 201 held,

***“The strange fact is that many witnesses do not properly identify another person even in daylight... It is at least essential to ascertain the nature of light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into.... See Wanjohi & Others -vs- Republic (1989) KLR 415.”***

We cannot help but note that the appellant never denied that Fredrick knew him prior to the incident or that he had worked for his father for a period of three years. Therefore, Fredrick was familiar with the appellant. In ***Anjononi & others -vs- Republic (1976-80) 1 KLR 1566***, this Court held at page 1568,

***“This was, however a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another.”***

We find that the recognition evidence was safe to warrant the appellant's conviction. We further find that there was no possibility of a mistaken identity. This is also supported by the fact that Fredrick in his initial report to APC Leonard gave the name of the appellant as one of the assailants who had attacked him.

20. On the issue of recent possession, this Court has decided in several cases and outlined when the principles of recent possession may be applied to a case. In ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- Republic -Criminal Appeal No. 272 of 2005***, this Court held,

***“....It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move***

*from one person to the other.”*

21. Fredrick testified that he reported the incident on the same day to APC Leonard; while he was taking APC Leonard and other police officers to the scene he saw the appellant walking; the appellant had worn a brown godfather hat which resembled the one which had been stolen. They stopped and arrested the appellant. Fredrick identified the hat as the one which had been stolen. He was able to identify it because firstly, it was given to him by his late father and secondly it had a mark where his grandfather had stitched it by hand. Based on the foregoing we concur with the two lower courts that the appellant was found in possession of the stolen hat which was positively identified by Fredrick.

22. We note that the appellant did not give any explanation for being in possession of the stolen hat. The appellant was found in possession of the hat a few hours after the robbery which leads us to the inevitable conclusion that he was involved in the robbery. In ***George Otieno Dida & Another -vs- Republic [2011] eKLR*** the appellant therein had been found in possession of the stolen goods less than five hours after the robbery and this Court held that:-

***“There are concurrent findings of fact by both the trial and first appellate courts that indeed there were robberies, several items including the ones produced in court were stolen in the course of those robberies, and the appellants were found in possession of the same only five hours or less after the robberies.....”***

***In our view, the evidence against the appellants though circumstantial, raised a rebuttable presumption of fact under section 119 of the Evidence Act, Cap 80 Laws of Kenya, that they were either the thieves or guilty receivers. The evidence excludes the latter because they were found in possession only less than 5 hours after the theft and it is not reasonably possible that the goods would have within that short time have changed hands.”***

23. Lastly, on the issue of sentence, the appellant was convicted of the offence of robbery with violence and sentenced to death. The appellant’s sentence is in conformity with **Section 296(2)** of the **Penal Code** which prescribes a mandatory death penalty for the offence of robbery with violence. **Section 361(1)(a) of the Criminal Procedure Code** provides:-

***“(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –***

***(a) On a matter of fact, and severity of sentence is a matter of fact;...”***

Based on the foregoing provision this Court has no jurisdiction to consider any issue on severity of sentence on a second appeal. See ***Solomon Kiptoo***

***Sawe -vs- Republic- Criminal Appeal No. 66 of 2006 & James Oromo -vs- Republic- Criminal Appeal No. 68 of 2006.***

24. The upshot of the foregoing is that we see no reason to interfere with the concurrent findings of the two lower courts. The appeal herein is hereby dismissed.

***Dated and delivered this 23<sup>rd</sup> day of January 2015.***

***ALNASHIR VISRAM***

.....

***JUDGE OF APPEAL***

***PATRICK KIAGE***

.....

***JUDGE OF APPEAL***

***KATHURIMA M'INOTI***

.....

***JUDGE OF APPEAL***

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

